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Insolvency Law

Facilitating the cross-border insolvency of multinational enterprise groups

Note by the Secretariat

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Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues that would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed. The Working Group considered this topic at its forty-fifth (April 2014) and forty-sixth (December 2014) sessions.

2. This note addresses two areas of relevance to the cross-border treatment of enterprise group insolvency, drawing upon the issues discussed and the points agreed at the forty-sixth session of Working Group V (December 2014).[2] Part I focuses on the provisions of domestic law that may be required to enable enterprise groups to address financial distress through a coordinated group insolvency solution developed for the group as a whole or for some of its parts. This part covers several issues, such as commencement of insolvency proceedings, procedural coordination and the participation of solvent group members, that are covered by the UNCITRAL Legislative Guide on Insolvency Law, part two and part three, chapter II (the Legislative Guide) and typically would be included in a domestic insolvency law, rather than in a legislative framework for cross-border recognition and assistance. However, the existence of domestic law provisions addressing those issues is likely to be of considerable assistance in developing and implementing a group insolvency solution in the cross-border context.

3. Part II focuses on a cross-border recognition regime and provides a set of draft legislative provisions that is based on the concepts and structure of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and addresses recognition, relief and cooperation in cross-border insolvency proceedings concerning members of an enterprise group. The draft legislative text responds to numerous comments made at the forty-sixth session of Working Group V that it is difficult to identify the topics and manner in which they should be addressed in order to better facilitate the cross-border insolvency of enterprise groups without seeing the outline of a draft legislative text and understanding the possible structure of enterprise group insolvency solutions.

4. Without seeking to pre-empt the decision the Working Group must make as to the form a text on the cross-border insolvency of enterprise groups might take, the draft text set out in part II provides a set of provisions that would be enacted by a State to provide a regime for cross-border recognition of, and assistance for, foreign insolvency proceedings concerning group members, where those proceedings are a

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

[2] For the report of the forty-sixth session, see document A/CN.9/829.

part of what, for the moment, is termed a "group insolvency solution". Those provisions could form an additional part of the Model Law or be developed as a stand-alone instrument.

5. The common purpose of a "group insolvency solution" would be the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those members of the enterprise group. Such a solution may involve multiple insolvency proceedings, possibly commenced in several States, that are coordinated through one (or, if necessary, several) jurisdiction(s). It is intended to be a flexible concept that may be achieved in different ways, depending on the circumstances of the specific group, its structure, business model, degree and type of integration between group members and so forth.

6. Several scenarios are included in the Annex to this paper (referred to as Scenarios 1 and 2) to facilitate discussion of the more complex points of developing and implementing a group insolvency solution. References to the scenarios are made throughout the following discussion.

7. The draft provisions are based on a "foreign group proceeding", which is defined to be a foreign proceeding (as defined in the Model Law) that is participating in a group insolvency solution. The draft text makes no distinction between main and non-main insolvency proceedings; proceedings that might, be regarded as main or non-main proceedings under the Model Law are to be recognized under this regime as a foreign group proceeding if they are shown to be participating in the development and implementation of a group insolvency solution. The consequences of the distinction between main and non-main proceedings in the Model Law (i.e. the relief available automatically on recognition of a main proceeding) are not part of this draft, which provides that relief is available on a discretionary basis for all recognized proceedings.

8. In addition to recognition, the draft provisions include:

(a) Provisional relief, based on article 19 of the Model Law and available once an application for recognition has been made and relief is urgently required;

(b) Relief available on recognition of the foreign group proceeding. This provision is based on articles 20 and 21 of the Model Law, with additional forms of relief that are likely to be required in the group context. At this stage, no provision has been included for automatic relief and the Working Group may wish to consider whether the draft should include any relief or other effects that would apply automatically on recognition of a foreign group proceeding, similar to those effects specified in articles 12, 20, 23 and 24 of the Model Law; and

(c) Cooperation involving courts and foreign representatives, based upon the recommendations of the Legislative Guide, part three, chapter III.

9. A number of articles of the Model Law are not repeated as they would principally be relevant only if the text to be developed was a stand-alone model

law.[3] The scope and relevance of those articles to any text being developed would need to be considered.

10. Certain new terms are suggested in the draft provisions (see article 2) to capture concepts relevant to the group context: the Working Group may wish to consider the suitability of that terminology.

I. Provisions for possible inclusion in domestic insolvency law

A. Introduction

11. Enterprise groups that do business across borders are often characterized by complex vertical or horizontal structures and varying degrees of integration and interrelationship between group members. Those interrelationships, which typically determine how the group operates and is structured when the business is solvent, may be disturbed by the onset of financial difficulty affecting one, some or even all of the group members that can lead to insolvency. Problems can arise in insolvency simply because the group is constituted by members that are each recognized as having a separate legal personality and existence. Where the group business depends upon some degree of integration between group members, concerning for example provision of financing, components, raw materials and intellectual property, the effect of insolvency on those relationships and the possibility that multiple insolvency proceedings may commence for the multiple separate legal entities within the group can make reorganization of the group's business (whether in whole or part) impossible.

12. Part three, chapter II of the Legislative Guide proposes a number of mechanisms, such as joint application for commencement, procedural coordination and in limited circumstances, substantive consolidation (Legislative Guide, part three, recs. 199-210 and 219-231), that are designed to facilitate the insolvency treatment of enterprise groups, albeit in a domestic context. Chapter III, which deals with international considerations, does not include analogous provisions, but rather focuses on extending the cooperation and coordination provisions of the Model Law to cover multiple proceedings in different jurisdictions concerning different group members.

13. Some consideration might be given to the extent to which the recommendations of part three, chapter II of the Legislative Guide would be relevant in the cross-border context and thus might be included in a revised legislative form in a new text. The following issues have been identified as raising particular concerns in the enterprise group context and might also be the subject of legislative provisions.

B. Commencement of insolvency proceedings

14. A key issue in facilitating the cross-border insolvency of groups relates to whether and how insolvency proceedings for multiple group members might be concentrated in a single or a limited number of jurisdictions. In both Scenarios 1

[3] For example, arts. 3 to 14.

and 2 of the Annex, this issue is relevant to commencement of proceedings in State C for D, E and G (Scenario 1) and D, E and F (Scenario 2). The following discussion is framed in the context of a number of group members participating in a group insolvency solution.

1. Centralizing proceedings relating to group members

15. As previously noted (A/CN.9/WG.V/WP.124, para. 13), several cases have occurred in practice in which the centre of main interests (COMI) of a number of group members has been determined to be located in the same jurisdiction, as shown in Scenario 2. Such a determination may be based upon factors of the kind referred to in paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law, in particular that such a jurisdiction is where the central administration of the various group members takes place. Other factors may also be relevant to determining COMI in a group context. These may include the connection and level of integration and reliance between the particular group members by virtue of their group membership and that development and implementation of a group insolvency solution (whether for the whole group or separate parts) will require the participation of certain group members (see Scenarios 1 and 2). While the COMI of each of the members of the enterprise group may be found to be located in one place, it is more likely to occur with respect to distinct parts or divisions of the group that can be reorganized separately. There may be several such locations within one enterprise group (as shown in Scenario 1).

16. Legislative provisions giving effect to the substance of paragraphs 145-147 of the Guide to Enactment and Interpretation and to other factors that might be relevant to the determination of the COMI of group members might be of assistance in developing and implementing a group insolvency solution through one or several central coordinating jurisdiction(s).

17. Even when the COMI of several or many group members is determined to be located in one place, insolvency proceedings for those group members might still be required in other places to deal with assets, business affairs and creditor claims in those places. Those proceedings might be akin to non-main proceedings under the Model Law were that distinction to be used. Additional measures might be required to assist the conduct of those proceedings and their coordination with the proceedings taking place at C in Scenario 2. These might include measures enabling the claims of creditors in D, E and F to be treated in the proceedings in C under the laws of D, E and F and measures limiting the commencement or continuation of insolvency proceedings in D, E and F. While some of those measures might be available as forms of relief additional to those available under articles 20 and 21 of the Model Law under a recognition regime as discussed below in part II, the enactment of relevant provisions in domestic laws might also be required.

2. The COMI of group members is in different locations

18. A different situation will arise where the COMIs (determined in accordance with the types of factors indicated above) of only a limited number of group members are located in the same jurisdiction, as indicated in Scenario 1. While that situation may prove sufficient to enable that jurisdiction to function as the

coordinating centre of the group insolvency solution, other group members that do not have their COMI in that jurisdiction may be treated in several ways:

(a) Proceedings for those other group members (in Scenario 1, companies D, E and G) might commence in C on the basis of criteria such as the location of an establishment or the presence of assets, if applicable. Those proceedings might be analogous to non-main proceedings under the Model Law;

(b) Creditors in D, E and G (Scenario 1) do not seek to commence proceedings in those jurisdictions, but are notified of the proceedings taking place in C;[4]

(c) The claims of creditors of companies D, E and G arising in those jurisdictions on the basis that they are the location of the COMIs of D, E and G, may be treated in C under the laws of D, E and G respectively, subject to safeguards protecting the interests of those creditors and approval by the courts of D, E and G;

(d) Proceedings for companies D, E and G may commence in D, E and G respectively on the basis of the location of their COMIs. Where a group insolvency solution is being pursued, it is desirable that these other proceedings assist the achievement of that group insolvency solution as much as possible through coordination and cooperation and be limited, as far as possible, to the assets and business affairs of the group member in D, E or G (analogous to the type of proceeding that may be commenced following recognition of a foreign main proceeding under article 28 of the Model Law);

(e) The courts in D, E and G might decline to commence proceedings in those jurisdictions in favour of the proceedings taking place in C, on criteria along the lines of those set forth in paragraph 32 of A/CN.9/WG.V/WP.124.[5] Alternatively, proceedings may commence in D, E and G, but be stayed or suspended pending the outcome of the proceedings in C and implementation of the group insolvency solution; or

(f) Where COMI-based proceedings commence in D, E or G and measures of the type available in paragraphs (c) or (e) are not available or those proceedings cannot be limited to local assets and affairs as indicated in paragraph (d), the proceedings in D, E or G will run in parallel with the proceedings in C. Development and implementation of a group insolvency solution must be achieved through coordination and cooperation. The more dispersed the proceedings are, the greater the reliance on coordination and cooperation in order to implement a group insolvency solution.

[4] This possibility is suggested in document A/CN.9/829, para. 45.

[5] These criteria included that the proceedings in D, E or G: (a) lacked purpose; (b) would not improve the protection of stakeholder interests in D, E or G, which could be adequately protected in the proceedings in C; (c) would not improve the realization of assets located in D, E or G; (d) were not required to address claims or realization of assets in D, E or G; (e) would impede achievement of the purpose of the proceedings in C; (f) were not in the global best interests of the enterprise group as a whole; and (g) were opposed by the insolvency representative of the proceedings in country C.

C. Participants

19. At its forty-sixth session, the Working Group recognized the need to identify the parties, including creditors and other stakeholders, that should be permitted to participate in proceedings directed towards achieving a group insolvency solution and to consider whether that participation might be facilitated by appointment of a representative (A/CN.9/829, para. 52). Participation and representation of creditors is discussed in some detail in recommendations 126-136 of the Legislative Guide. In the cross-border context, a foreign creditor's right of participation is recognized in article 13 of the Model Law, although it is limited to what is permitted for creditors under the law of the enacting State. In the enterprise group context, creditor participation is discussed in the Legislative Guide, part three, chapter II, paragraph 26.

20. In addition to creditors, there are other stakeholders who may have an interest in participating in insolvency proceedings in the group context. These stakeholders may fall within the term "parties in interest" as explained by the Legislative Guide (subpara. 12 (d) (d)), which recommends that they have a right to be heard and to appeal (rec. 137), or within the phrase "interested persons" as used in the Model Law (e.g. Preamble, arts. 1 and 22). Article 22 requires the court to ensure the interests of those persons are protected when relief is ordered.

21. An important aspect of the issue of participation in the group context concerns which creditors and other stakeholders of which group members are being considered. Where a solution for a number of group members is being developed, the insolvency representatives of those group members will clearly need to be involved, whether individually or through a committee that might be formed by the different insolvency representatives of the members participating in a group solution (discussed further below). Other parties that may need to participate (leaving aside for separate consideration the extent of that participation) may include creditors of those group members, solvent group members whose participation is necessary to the success of the group solution (see below), and possibly other stakeholders. Some of the issues relating to participation might be resolved through the use of cross-border insolvency agreements, referred to in draft articles 10 and 17 below.

22. As to the proceedings in which participation of those parties might be relevant, a broad approach might be desirable. It may be relevant in Scenario 1, for example, for a representative of the creditors of D to participate in proceedings in E as well as in G. In other words, creditors' interests might need to be represented more widely than in the proceedings of the member of which they are creditors, especially when that member is participating in a more broadly-based insolvency solution.

23. The Working Group may wish to consider whether any of the recommendations referred to above should be reframed as legislative provisions for inclusion in a legislative regime addressing enterprise groups and whether additional provisions may be required.

D. Solvent group members

24. At its forty-sixth session, the Working Group also recognized the need to consider voluntary participation of solvent group members, as well as their creditors

and other stakeholders, in reorganization proceedings. The Legislative Guide, part three, paragraph 152 and recommendation 238 suggest the inclusion of specific provisions in domestic law. Appointment of a representative of a solvent group member to act in relevant insolvency proceedings relating to a group insolvency solution might also be required.

E. Summary of part I

25. Part I has outlined a number of topics for possible treatment in a draft legislative text addressing enterprise groups, including:

(a) Recommendations of part three, chapter II of the Legislative Guide such as joint application for commencement, procedural coordination and substantive consolidation;

(b) Factors relevant to determination of the COMI of an enterprise group member, including those outlined in paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law and additional factors specific to enterprise groups;

(c) The possibility of supporting the implementation of a group insolvency solution by limiting the commencement or continuation of some proceedings; limiting the scope of some proceedings commenced to local assets; declining to commence proceedings in deference to foreign proceedings; and recognizing and approving the treatment of creditor claims in foreign proceedings;

(d) Permitting the participation of solvent group members in a group insolvency solution; and

(e) Identifying those creditors and other stakeholders that might participate in proceedings that are part of a group insolvency solution and considering the means of facilitating that participation; for that purpose recommendations from the Legislative Guide, parts two and three might be relevant.

II. Draft legislative provisions on the cross-border insolvency of enterprise groups

Preamble

The purpose of these provisions is to address the structure and conduct of cross-border insolvency proceedings taking place in more than one State concerning two or more members of an enterprise group in a manner that:

(a) Facilitates the development of a range of approaches to the resolution of insolvency, whether affecting the whole or part of the enterprise group;

(b) Takes account of the particularities of the enterprise group context, including the need to address [independent] [integrated] businesses conducted through the separate legal entities that comprise the enterprise group;

(c) Fosters coordination of and cooperation between insolvency proceedings affecting members of an enterprise group;

(d) Permits the participation of any group member, whether solvent or insolvent, that is affected by the insolvency of other group members; and

(e) Facilitates reorganization, going concern sale or liquidation of businesses in a manner that maximizes value and protects the interests of creditors and other stakeholders of affected group members.

A. General Provisions

Article 1. Scope of application[6]

1. These provisions apply in the context of the insolvency of one or more members of an enterprise group where:

(a) Assistance is sought in this State by a foreign court, a foreign group representative or an enterprise group member in connection with a foreign group proceeding [concerning an enterprise group member] [relating to an enterprise group insolvency solution]; or

(b) Assistance is sought in connection with a proceeding under the law of this State in a foreign State where a foreign group proceeding [concerning an enterprise group member] [relating to an enterprise group insolvency solution] is pending or has been applied for; or

(c) A foreign group proceeding and a proceeding under the law of this State [concerning an enterprise group member] [relating to an enterprise group insolvency solution] are taking place concurrently; or

(d) Creditors of different group members, group members other than those subject to insolvency proceedings or other interested persons have an interest in requesting the commencement of, or participating in, a proceeding under the law of this State.

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

Article 2. Definitions

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;[7]

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;[8]

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;[9]

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[6] UNCITRAL Model Law on Cross-Border Insolvency, art. 1.

[7] UNCITRAL Legislative Guide on Insolvency Law, part three, Introduction, subpara. 4 (b) and footnote 3.

[8] Ibid., subpara. 4 (a).

(d) "Enterprise group member" means an enterprise referred to in subparagraph (b);

(e) "Foreign group member representative" means a person or body, including one appointed on an interim basis, authorized in a [foreign group] proceeding [referred to in subparagraph (h)] to administer the reorganization or the liquidation of the assets or affairs of a debtor that is an enterprise group member or to act as a representative of such a proceeding;[10]

(f) "Enterprise group committee" means a committee comprising foreign group member representatives;

(g) "Enterprise group committee representative" means a person or body designated by an enterprise group committee to act as its representative;

(h) "Foreign group proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor that is a member of an enterprise group are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation in [the context of] an enterprise group insolvency solution;[11]

(i) "Enterprise group insolvency solution" means a proposal for coordinated reorganization, sale as a going concern or liquidation (of the whole or part of the business or assets) of two or more members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members. An enterprise group insolvency solution may be coordinated through a proceeding in a State that is the centre of main interests of at least one enterprise group member.

B. Recognition of a foreign proceeding and relief

Article 3. Recognition of a foreign group proceeding[12]

1. A foreign group member representative[13] may apply to the court for recognition of a foreign group proceeding.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign group proceeding and appointing the foreign group member representative; or

[9] Ibid., subpara. 4 (c).

[10] Based on Model Law, art. 2, subpara. (d). It is assumed, as in the Model Law, that the foreign representative could also be a debtor in possession: see Guide to Enactment and Interpretation, para. 71.

[11] Based on Model Law, art. 2, subpara. (a).

[12] Ibid., art. 15.

[13] As appropriate, the following articles that refer to the foreign group member representative could also apply to an enterprise group committee representative, where such a committee was formed.

(b) A certificate from the foreign court affirming the existence of the foreign group proceeding and of the appointment of the enterprise group member representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign group proceeding and of the appointment of the foreign group member representative.

3. An application for recognition shall also be accompanied by evidence that:

(a) A group insolvency solution [is being developed] [has been developed] for the whole or a part of the enterprise group;[14]

(b) There is a reasonable prospect of implementing the group insolvency solution; and

(c) The foreign group proceeding is [a necessary or integral part of] [participating in] the group insolvency solution.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 4. Presumptions concerning recognition[15]

1. If the decision or certificate referred to in article 3, paragraph 2 indicates that the foreign group proceeding is a proceeding within the meaning of article 2, subparagraph (h) and that the foreign group member representative is a person or body within the meaning of article 2, subparagraph (e), the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. In the absence of proof to the contrary, a group member's registered office or principal place of business[16] is presumed to be the centre of that group member's main interests.[17]

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[14] Details of the evidence required to satisfy these requirements could be developed as substantive provisions or included in any commentary or guide to enactment accompanying the text.

[15] Model Law, art. 16.

[16] Principal place of business has replaced the reference in art. 16, para. 3 of the Model Law to "habitual residence" on the basis that while the latter is unlikely to be relevant to the enterprise group context, principal place of business may be relevant for unincorporated group members.

[17] As noted above in para. 14, the factors that are relevant to determination of the centre of main interests in the group context may be wider than those applicable in the case of a single debtor. This could be explained in any commentary or guide to enactment accompanying this text and the relevant factors enumerated.

Article 5. Decision to recognize a foreign group proceeding[18]

1. [Subject to any applicable public policy exception,][19] a foreign group proceeding shall be recognized if:

(a) The foreign group proceeding is a proceeding within the meaning of article 2, subparagraph (h);

(b) The foreign group member representative applying for recognition is a person or body within the meaning of article 2, subparagraph (e);

(c) The application meets the requirements of article 3, paragraph 2;

(d) The application has been submitted to the court referred to in article ...;[20] and

(e) The requirements of article 3, paragraph 3, are met.

2. An application for recognition of a foreign group proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 4, the foreign group member representative shall inform the court of changes in the status of the foreign group proceeding or in the status of their own appointment occurring after the application for recognition is made.[21]

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding[22]

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign group member representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a foreign group proceeding or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the enterprise group member's assets;

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the foreign group member representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

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[18] Model Law, art. 17.

[19] It may be appropriate to include in the draft text an article along the lines of art. 6 of the Model Law.

[20] It may be appropriate to include in the draft text an article along the lines of art. 4 of the Model Law.

[21] Based on the Model Law, art. 18.

[22] Based on the Model Law, art. 19.

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements;

(e) Any relief mentioned in article 7, paragraph 1.

2. [*Insert provisions of the enacting State relating to notice.*]

3. Unless extended under article 7, subparagraph 1(g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [foreign group proceeding] [group insolvency solution].

Article 7. Relief that may be granted upon recognition of a foreign group proceeding[23]

1. Upon recognition of a foreign group proceeding, where necessary to protect the assets of the enterprise group member or the interests of creditors and facilitate the implementation of a group insolvency solution, the court may, at the request of the foreign group member representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member to enable a group insolvency solution to be developed;

(c) Staying execution against the assets of the enterprise group member;

(d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;

(e) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the enterprise group member representative or another person designated by the court;

(f) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the enterprise group member;

(g) Extending any provisional relief granted;

(h) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution and authorizing the continued provision of finance under those funding arrangements where the funding entity is located in this State;

(i) Subject to article 8, approving treatment in the foreign group proceeding of the claims of creditors located in this State; or

[23] This article is based upon arts. 20 and 21 of the Model Law, with some additions.

(j) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a foreign group proceeding the court may, at the request of the foreign group member representative, entrust the distribution of all or part of the assets of the enterprise group member located in this State to the foreign group member representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Article 8. Protection of creditors and other interested persons[24]

1. In granting or denying relief under article 6 or 7, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[25]

2. The court may subject relief granted under article 6 or 7 to conditions it considers appropriate.

3. The court may, at the request of the foreign group member representative or a person affected by relief granted under article 6 or 7, or at its own motion, modify or terminate such relief.

C. Cooperation with foreign courts and foreign representatives

Article 9. Cooperation and direct communication between a court of this State and foreign courts or foreign group member representatives[26]

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign group member representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court to facilitate the development and implementation of a group insolvency solution.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign group member representatives concerning members of the same enterprise group and in particular with respect to implementation of a group insolvency solution and the role of the respective courts when such a solution is to be implemented.

[24] Model Law, art. 22.

[25] Any commentary or guide to enactment prepared to accompany this draft text might explain in more detail the notion of adequate protection and the standard that might be applicable, for example, that creditors of the enacting State whose claims are to be treated in the foreign group proceeding under draft article 7 (1)(i) should be no worse off than if those claims were treated in a proceeding under the laws of the enacting State. The Working Group may wish to consider whether this standard should be specified in draft article 8.

[26] Legislative Guide, part three, recs. 240 and 242.

Article 10. Cooperation to the maximum extent possible under article 9[27]

Cooperation to the maximum extent possible for the purposes of article 9 may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;[28]

(b) Participation in communication with the foreign court or foreign group member representative;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members [subject to foreign group proceedings] [participating in a group insolvency solution];

(d) Coordination of concurrent foreign group proceedings;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval of the treatment of creditors of the enacting State in a foreign group proceeding;

(g) Approval of cross-border insolvency agreements to facilitate the implementation of a group insolvency solution;[29] and

(h) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 11. Conditions applicable to cross-border communication involving courts[30]

Communication for the purposes of article 9, paragraph 2, is subject to the following conditions:

(a) The time, place and manner of communication shall be determined between the courts or between the courts and foreign group member representatives;

(b) Notice of any proposed communication shall be provided to interested persons in accordance with applicable law;

(c) A foreign group member representative is entitled to participate in a communication. An interested person may participate in a communication in accordance with applicable law and when determined by the court to be appropriate;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication and filed as part of the record of the proceedings;

(e) Communications shall be treated as confidential only in exceptional cases to the extent considered appropriate by the courts and in accordance with applicable law; and

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[27] Ibid., rec. 241.

[28] This might include providing to the foreign court or the foreign group member representative copies of documents issued by the court or that have been or are to be filed with the court concerning the enterprise group members subject to foreign group proceedings.

[29] See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

[30] Legislative Guide, part three, rec. 243.

(f) Communication should respect: (i) the mandatory rules of the jurisdictions involved in the communication; (ii) the substantive and procedural rights of interested persons; and (iii) the confidentiality of information.

Article 12. Effect of communication under article 9[31]

Participation by a court in communication pursuant to article 9, paragraph 2 does not imply:

(a) A compromise or waiver by the court of any powers, responsibilities or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts. Each court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

Article 13. Coordination of hearings[32]

1. The court may conduct a hearing in coordination with a foreign court.

2. The substantive and procedural rights of parties and the jurisdiction of each court may be safeguarded by reaching agreement on the conditions to govern the coordinated hearings.[33]

3. Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

Article 14. Cooperation and direct communication between the [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] and foreign courts and foreign group member representatives[34]

1. In the matters referred to in article 1, the [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent

[31] Ibid., rec. 244.

[32] Ibid., rec. 245.

[33] These conditions might include: the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to a foreign court; and limitation of the jurisdiction of each court to the parties appearing before it.

[34] Legislative Guide, part three, recs. 246 and 248.

possible with foreign courts and foreign group member representatives to facilitate the development and implementation of a group insolvency solution.

2. The [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign group member representatives.

Article 15. Cooperation to the maximum extent possible under article 14[35]

For the purposes of article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members participating in a group insolvency solution, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of cross-border insolvency agreements to facilitate the implementation of a group insolvency solution;

(c) Allocation of responsibilities between [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] and foreign group member representatives;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members [subject to foreign group proceedings] [participating in a group insolvency solution];[36] and

(e) Coordination with respect to the proposal and negotiation of reorganization plans.

Article 17. Authority to enter into cross-border insolvency agreements[37]

A cross-border insolvency agreement may be entered into to facilitate the implementation of a group insolvency solution.

Article 18. Appointment of a single or the same insolvency representative[38]

1. The court may coordinate with foreign courts with respect to the appointment of a single or the same group member representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the group member representative is qualified for appointment in each of the relevant States.

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[35] Ibid., rec. 250.

[36] This may include: day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; exercise of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors.

[37] UNCITRAL Legislative Guide, rec. 253.

[38] Ibid., rec. 251.

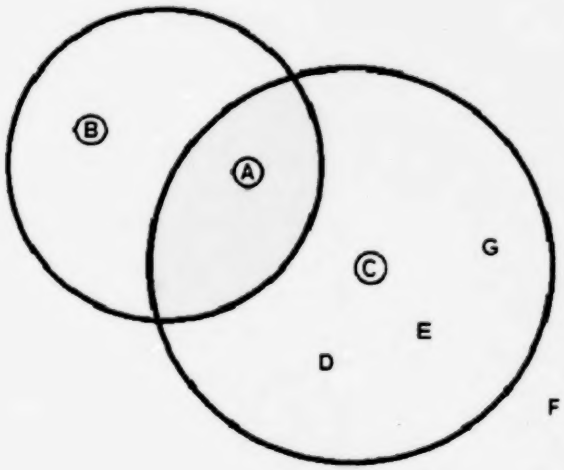
2. To the extent required by applicable law, the group member representative is subject to the supervision of each appointing court.

D. Coordination of concurrent proceedings

Chapter V, articles 28 to 32 of the Model Law address issues of coordination between concurrent proceedings and the adjustment of relief between the different proceedings. The Working Group may wish to consider whether provisions of that nature are required in a new text and if so, the content of those provisions.

Annex

Scenario 1

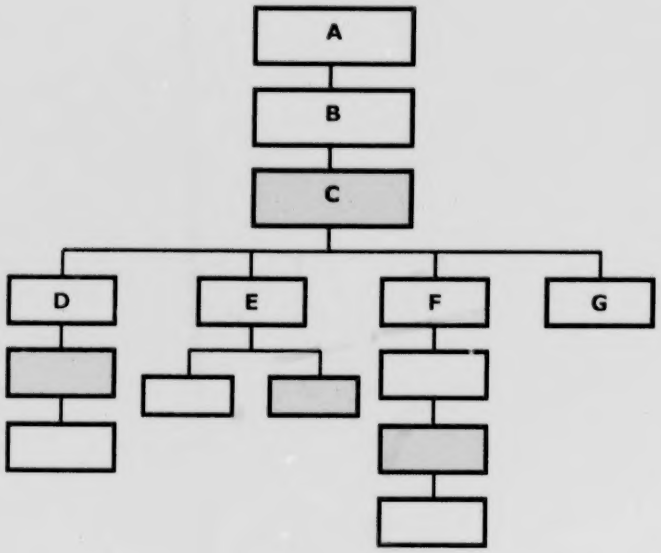


1. Scenario 1 represents an enterprise group with seven separate legal entities, each with its COMI in a different jurisdiction. Two "group solutions" are proposed: the first centred in jurisdiction B (involving entity B and some of entity A's assets or operations) and the second centred in jurisdiction C (involving entities C, D, E, G and some of entity A's assets or operations). F is a group member not involved in either group solution.

2. To facilitate those group solutions, the proceedings in C would need to be able to obtain relief from the courts in the other relevant jurisdictions. For example, the representatives of proceedings in C would need to appear in jurisdiction D and request relief regarding the assets or operations of entities A, C, D, E and G (if any) located in jurisdiction D. It should be possible to request such relief even though the COMIs of most of those entities are not in C (meaning that the proceeding in C would, under the existing Model Law, not be seen as the "main" proceeding for A, D, E and G), and even though jurisdiction D might normally see itself as the proper jurisdiction for a main proceeding for entity D.

3. Similarly, the court in A would need to be able to provide or coordinate relief in response to separate requests from B and C, regarding the two separate group solutions, even though entity A's COMI is in A. Scenario 1 does not depict the ownership structure of the group (unlike Scenario 2) but only its geographic distribution. The legislative provisions that might be required to facilitate development and implementation of a group insolvency solution are discussed in above in part I.

Scenario 2



1. Scenario 2 represents a company with two major product lines. Product 1 is manufactured, sold and installed by subgroups D and E and product 2 by subgroup F. Company G is a solvent sales company in another jurisdiction, but D, E, F and G all have inter-company indebtedness to C. With the exception of C and F, which are co-located, the other group companies are located in different States. The overall group COMI is in State C; this is not disputed. The main asset-owning companies are shaded on the chart. Management faces three possibilities:

(a) Addressing the insolvency and restructuring of C, keeping all subsidiaries whole;

(b) As in (a), but also involving insolvencies and restructuring of D, E and F if it proves necessary to control the actions of creditors or if material debt forgiveness is required by the creditors of those companies, with the same office holders being appointed to C, D, E and F based on the group COMI being located in State C; or, as a last resort,

(c) If (b) is not possible for any reason, such as a holdout by creditors of D, there will be attempts to restructure the businesses of D and E together, based on the COMI of D and, separately, of C and F together based on the shared COMI.